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IN THE
Supreme Court of the United States

OCTOBER TERM, 1980

ROBERT WYLER,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. WHETHER THE COURT SHOULD ISSUE A WRIT OF CERTIORARI IN THIS CASE TO RESOLVE THE CONFLICT BETWEEN THE SECOND CIRCUIT, WHICH STILL EMPLOYS THE "FARCE AND MOCKERY" TEST, AND ALL OF THE OTHER CIRCUITS, WHICH HAVE NOW ADOPTED THE "REASONABLE COMPETENCY" TEST FOR JUDGING WHETHER A DEFENDANT HAS BEEN AFFORDED HIS SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL.

2. WHETHER A DEFENDANT MAY BE TRIED IN ABSENTIA WHEN HE DISAPPEARS BEFORE THE JURY HAS BEEN EMPANELED AND THE TRIAL HAS BEGUN.

3. WHETHER THE DISTRICT COURT ERRED IN REFUSING TO HOLD A HEARING ON PETITIONER'S MOTION TO SET ASIDE HIS VERDICT OF CONVICTION BECAUSE HE HAD NOT BEEN AFFORDED EFFECTIVE ASSISTANCE OF COUNSEL, WHEN THE PROPER DETERMINATION OF THAT MOTION REQUIRED CONSIDERATION OF FACTS OUTSIDE THE RECORD.

4. WHETHER THE DISTRICT COURT ERRED IN FAILING TO HOLD A HEARING TO DETERMINE WHETHER PETITIONER'S ABSENCE AT TRIAL WAS KNOWING AND VOLUNTARY, BEFORE TRYING HIM IN ABSENTIA.

5. WHETHER THE TRIAL JUDGE ERRED IN INSTRUCTING THE JURY THAT PETITIONER HAD KNOWINGLY ABSENTED HIMSELF FROM TRIAL, AND IN FAILING TO INSTRUCT THEM THAT THEY COULD CONSIDER FLIGHT AS EVIDENCE OF CONSCIOUSNESS OF GUILT ONLY IF IT WAS VOLUNTARY.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

ROBERT WYLER,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner Robert Wyler respectfully prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Second Circuit affirming the judgment of conviction entered against the petitioner by the United States District Court for the Southern District of New York.

OPINIONS BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto at p. 1. No opinion was rendered by the District Court for the Southern District of New York.

JURISDICTION

The date of the judgment of the United States Court of Appeals for the Second Circuit was November 25, 1980, which was also the date of entry. A timely petition for rehearing and rehearing en banc was filed by petitioner. That petition was denied on February 5, 1981. A copy of the order denying rehearing is set forth in the Appendix at 3. On March 31, 1981 Justice Marshall extended petitioner's time to file a petition for a writ of certiorari to May 6, 1981. A copy of that order is set forth in the appendix at 4. This Court's jurisdiction is invoked under Title 28, United States Code, Section 1254(1).

STATEMENT OF THE CASE

Petitioner Robert Wyler was indicted on March 3, 1978 for conspiracy to distribute cocaine (count I) and four substantive counts charging distribution of cocaine (counts II-V). He was arraigned on March 16, 1978 and released on bail on March 20, 1978, the same date that an attorney entered his appearance in petitioner's behalf in this case. Between March 16th and petitioner's release on bail, the only conversations petitioner had with his attorney concerned bail.

Thereafter, petitioner tried, through several telephone calls to his attorney, to arrange meetings with him to discuss the facts and defenses for the upcoming trial. However, his attorney always refused to have such a meeting, explaining that he was tied up with other cases. The attorney also informed petitioner that he had not received any of the wiretap recordings from petitioner's case and that any meeting should take place only after those tapes were in the lawyer's possession.

At the pre-trial conference in the case on April 11, 1978, petitioner's counsel did not even appear until the

conference was almost over. Consequently, petitioner had to be represented by another "stand-in" attorney. At that conference, the judge set April 24, 1980 as the date on which trial would commence.

After that conference, petitioner had a heated argument in the corridor outside the courtroom with his attorney, during which petitioner demanded to know why his attorney had failed to advise the court that he was not ready for trial and could not be ready by April 24th. Counsel responded that he was afraid that if he had told the judge that he was not ready, the judge might have revoked petitioner's bail.

Petitioner thereafter again phoned his lawyer's office to make an appointment to discuss the case. An appointment was made for a time when the attorney indicated that he would be in the office. When petitioner arrived at the office for that appointment, however, the lawyer was not there. Although petitioner waited at the office for several hours, the lawyer never arrived.

Thereafter, petitioner's attorney continued to be unavailable for conferences and failed to arrange for petitioner to listen to the wiretap tapes.

Counsel never conferred with petitioner as to the facts of petitioner's case, or any defenses or trial strategies that might be interposed in petitioner's behalf. For example, petitioner claimed that the money which was discussed in the tape conversations was payment for the return of an automobile, not the sale of drugs.

Counsel did not conduct any investigation in regard to this case on petitioner's behalf. Moreover, he did not interview any witnesses who might have been called at a trial, despite the fact that petitioner knew several persons who could have disputed parts of the Government's proof. Counsel likewise never discussed with deponent the Government's expected proof in the case or petitioner's knowledge of the Government's witnesses.

In petitioner's last telephone conversation with his attorney, petitioner asked if the attorney would be getting an adjournment on the 24th of April so that the case could be properly prepared for trial. Counsel replied that the case would have to go to trial on that date under any circumstances and there was nothing he could do about it.[1]

Petitioner's trial counsel maintained that he was unable to meet with petitioner or prepare for trial in this case because he was on trial in a homicide case during virtually the entire period from petitioner's arraignment until the time of trial.[2]

Rather than go to trial completely unprepared, petitioner became a fugitive.

When petitioner failed to appear on the first day of trial, the judge failed to hold any hearing to determine whether his absence was voluntary. Rather, he simply ruled that the trial would proceed in his absence.

At the conclusion of trial, the court instructed the jury that there was no question that petitioner had knowingly absented himself from trial, and that flight could be considered by the jury as evidence of consciousness of guilt. The Court failed, however, to advise the jury that non-appearance had to be voluntary before it could be considered on that issue.

After petitioner's conviction, he was captured and brought before the court for sentencing. At that time he moved to set aside the jury's verdict on the ground that his

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1. These facts are taken from petitioner's affidavit in support of his motion to set aside the verdict. The trial judge refused to hold a hearing on this motion.

2. See affidavit of trial counsel, submitted in support of petitioner's motion to set aside the verdict.

counsel's representation had been so inadequate as to violate his rights under the Sixth Amendment of the United States Constitution. The trial judge denied that motion without a hearing.

On appeal, the Second Circuit Court of Appeals, applying the "farce and mockery" standard which that Circuit still employs to judge the competency of trial counsel, held that petitioner's Sixth Amendment rights had not been violated.

REASONS FOR GRANTING THE WRIT

THE COURT SHOULD ISSUE A WRIT OF CERTIORARI TO RESOLVE THE CONFLICT BETWEEN THE SECOND CIRCUIT, WHICH STILL EMPLOYS THE "FARCE AND MOCKERY" TEST TO EVALUATE A DEFENDANT'S CLAIM THAT HE HAS BEEN DENIED HIS SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL, AND ALL OF THE OTHER CIRCUITS, WHICH HAVE NOW ADOPTED THE "REASONABLE COMPETENCY" TEST

The Second Circuit is the only circuit which still holds that an accused's right to counsel is satisfied so long as his representation was not so inadequate and incompetent as to render the trial a "farce and a mockery" which "shocks" the conscience of the Court. Every other Circuit has now rejected that test, holding instead that a defendant is entitled under the Sixth Amendment to "counsel reasonably likely to render and rendering reasonably effective assistance." *United States v. Bisch,* 584 F.2d 1113, 1120-24 (1st Cir. 1978); *Marzullo v. Maryland,* 561 F.2d 540 (4th Cir. 1977); *United States v. Easter,* 539 F.2d 663, 665-67 (8th Cir. 1976); *Williams v. Twomey,* 510 F.2d 634, 641 (7th Cir. 1975); *Beasley v. United States,* 491 F.2d 687 (6th Cir. 1974); *West v. Louisiana,* 478 F.2d 1026 (5th Cir. 1973); *Moore v. United States,* 432 F.2d 730 (3d Cir. en banc 1970); *Bruce v. United States,* 379 F.2d 113 (D.C. Cir. 1967); see also *United States v. DeCoster,* 487 F.2d 1197 (D.C. Cir. 1973). Expressed in different terms, this standard requires that an accused be afforded counsel of "normal competency." See e.g. *Moore v. United States, supra,* 432 F.2d at 737.

In the present case, application of the farce and mockery standard led the Second Circuit to reject petitioner's Sixth Amendment claim, despite the fact that his trial counsel, by his own admission, had spent virtually no time preparing for this multi-count, multi-defendant drug conspiracy trial. According to that attorney, he had been actually engaged in an unrelated homicide trial during almost the entire period from petitioner's arraignment until the day when trial in this case began.

Consequently, that attorney continually refused petitioner's requests that they meet to discuss the facts and defenses for the upcoming trial. Counsel also failed to arrange for petitioner to listen to the wiretap tapes in the case, despite the fact that petitioner was supposedly recorded on those tapes. He also failed to interview potential witnesses, despite the fact that petitioner knew of at least two witnesses who could give testimony contradicting portions of the government's proof.

Petitioner submits that this and other acts and omissions by his trial attorney deprived him of the reasonably competent counsel to which he would be entitled in every circuit except the Second Circuit. Consequently, this Court should grant petitioner's writ of certiorari to direct that Circuit to adopt the reasonable competency test.

Adoption of the "reasonable competency" standard is compelled by the Supreme Court's decision in *McMann v. Richardson,* 397 U.S. 759 (1970), in which the Court held that defendants "are entitled to the effective assistance of competent counsel." The proper test, the Court stated, is whether counsel's performance "was within the range of competence demanded of attorneys in criminal cases." Id., 397 U.S. at 770-71. See also *Reese v. Georgia,* 350 U.S. 85 (1955); *White v. Ragen,* 324 U.S. 760 (1945); *Glasser v. United States,* 315 U.S. 60 (1942); *Powell v. Alabama,* 287 U.S. 45 (1932).

Elsewhere, the Supreme Court has expressed a "vigilant concern for the maintenance of the right of an accused to assistance of counsel" (*Avery v. Alabama, supra,* 308 U.S. at 445), describing this right as one of "peculiar sacredness." The Court has also held that in modern times the right to competent counsel is particularly acute since it is through this counsel that the defendant acquires the "balance" adequately to confront a "prosecution by experienced and learned" professional prosecutors. *United States v. Ash,* 413 U.S. 300, 309 (1973).

Moreover, it is significant that the District of Columbia Circuit—the very Circuit which created the farce and mockery standard (*Diggs v. Welsh,* 148 F.2d 667 (D.C. Cir. 1945), *cert. denied,* 325 U.S. 889 (1945)—has now rejected it. *Bruce v. United States,* 378 F.2d 113 (D.C. Cir. 1967); see also *United States v. DeCoster, supra; Scott v. United States,* 427 F.2d 609 (D.C. Cir. 1970). At the time of the *Diggs* decision, the Sixth Amendment was thought to guarantee merely the formal assignment of counsel; consequently, counsel's performance after assignment was judged by the due process clause of the Fifth Amendment. The farce and mockery standard was thus originally a progeny solely of the Fifth Amendment. By default, it was eventually employed in cases applying the Sixth Amendment as well. However, in view of Supreme Court rulings subsequent to *Diggs,* holding that the Sixth Amendment requires not merely assignment of counsel, but also the effective assistance of counsel, the District of Columbia Circuit, in 1967, overruled the farce and mockery standard of the *Diggs* decision in favor of the normal competency standard (*Bruce v. United States, supra,*) and has subsequently noted that:

> . . . [w]hat is involved here in the Sixth Amendment. The Sixth Amendment has overlapping but more stringent standards than the Fifth Amendment as is clear from other

contexts. Compare, for example, *United States v. Wade,* 388 U.S. 293 . . . (1967), with *Stovall v. Denno,* 388 U.S. 293 . . . (1967).

Scott v. United States, supra, 427 F.2d at 610.

Further support for this higher standard of attorney competency is found in the fact that the Chief Justice of the United States has made speeches decrying the poor quality of performance of certain members of the federal bar and demanding the application of higher standards to prevent criminal defendants from being left to the mercies of incompetent counsel. See eg. Berger, *The Special Skills of Advocacy: Are Specialized Training and Certification of Advocates Essential to Our System of Justice?* 42 Fordham L. R. (1973). If these pronouncements are not to be disregarded as mere verbiage, then the federal courts must take a leading role in requiring reasonable competency of counsel who represent defendants in federal criminal proceedings.

There can be no serious doubt that trial counsel in this case failed to perform even the most fundamental duties constitutionally required of counsel by the Federal Courts. See eg. *United States v. DeCoster, supra,* 487 F.2d at 1203-04;[3] *Coles v. Peyton,* 389 F.2d 224, 226 (4th Cir.),

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3. "*In General*—Counsel should be guided by the American Bar Association Standards for the Defense Function. They represent the legal profession's own articulation of guidelines for the defense of criminal cases.

Specifically—1) Counsel should confer with his client without delay and as often as necessary to elicit matters of defense, or to ascertain that potential defenses are unavailable. Counsel should discuss fully potential strategies and tactical choices with his client.

2) Counsel should promptly advise his client of his rights and take all actions necessary to preserve them. Many rights can on-

(Footnote continued on next page)

cert. denied, 393 U.S. 849 (1968).[4] Specifically, he failed:

(1) "To see to it that all available defenses are proffered" and that all necessary actions are taken to preserve the rights of the defendant. *United States v. Bennett,* 409 F.2d 888, 89-900 (2d Cir. 1969), cited with approval in *United States v. Ash, supra,* 413 U.S. at 317; *United States v. DeCoster, supra,* 487 F.2d at 1203-04 (D.C. Cir.); see also *Beasley v. United States, supra,* 491 F.2d at 696 (6th Cir.); *United States ex rel. Saltys v. Adams, supra* 465 F.2d at 1028-29 (2d Cir.); *United States v. Fisher,* 477 F.2d 300, 304 (4th Cir. 1973); *Moore v. United States, supra,* 433 F.2d at 737-38 (3d Cir.);

Footnote 3 continued from previous page

ly be protected by prompt legal action. The Supreme Court has, for example, recognized the attorney's role in protecting the client's privilege against self-incrimination. *Miranda v. Arizona,* 384 U.S. 436 [86 S. Ct. 1602, 16 L.Ed. 2d 6941] (1966), and rights at a line-up, *United States v. Wade,* 388 U.S. 218, 227 [8] S. Ct. 1926, 18 L.Ed. 2d 1149] (1967). Counsel should also be concerned with the accused's right to be released fro custody pending trial, and be prepared, where appropriate, to make motions for a pre-trial psychiatric examination or for the suppression of evidence.

3) Counsel must conduct appropriate investigations, both factual and legal to determine what matters of defense can be developed. The Supreme Court has noted that the adversary system requires that 'all available defenses are raised' so that the government is put to its proof. This means that in most cases a defense attorney, or his agent, should interview not only his own witnesses but also those that the government intends to call, when they are accessible. The investigation should always include efforts to secure information in the possession of the prosecution and law enforcement authorities. And, of course, the duty to investigate also requires adequate legal research." (*Id.* 487 F.2d at 1203-04)

4. ". . . Counsel should be afforded a reasonable opportunity to prepare to defend an accused. Counsel must confer with his client without undue delay and as often as necessary, to ad-

(Footnote 4 continued on next page)

(2) To interview and present available witnesses for the defendant. *White v. Ragen, supra,* 324 U.S. at 763; *Beasley v. United States, supra,* 491 F.2d at 691-96 (6th Cir.); *United States v. DeCoster, supra,* 487 F.2d at 1204 (D.C. Cir.); *Gomez v. Beto,* 462 F.2d 596, 597 (5th Cir. 1972).

(3) To make motions for the suppression of evidence where appropriate. *United States v. DeCoster, supra,* 487 F.2d at 1203 (D.C. Cir.); *Saltys v. Adams, supra,* 465 F.2d at 1028-29 (2d Cir.); *Moore v. United States, supra,* 432 F.2d at 738-39 (3d Cir. *en banc.*)

(4) To conduct all appropriate factual and legal investigations to determine what defenses may be raised. *Powell v. Alabama, supra,* 287 U.S. at 71; *Beasley v. United States, supra,* 491 F.2d at 696 (6th Cir.); *United States v. DeCoster, supra,* 487 F.2d at 1204 (D.C. Cir.); *United States v. Fisher, supra,* 477 F.2d at 202 (4th Cir.); *United States ex rel. Marcelin v. Mancusi, supra,* 462 F.2d at 46-48 (2d Cir., *Kaufman, Chief Judge dissenting); Gomez v. Beto, supra,* 462 F.2d at 597 (5th Cir.); *Moore v. United States, supra,* 432 F.2d at 739 (3d Cir. *en banc.*); *Coles v. Peyton, supra,* 389 F.2d at 226 (4th Cir.).

(5) To confer with the defendant 'as often as necessary to advise him of his rights and to elicit matters of defense.' *Coles v. Peyton, supra,* 389 F.2d at 226 (4th Cir.); see also *McMann v. Richardson, supra,* 397 U.S. at 770-71; *White v. Ragen supra.* 324 U.S. at 763; *Powell v. Alabama, supra,* 397 U.S. at 81; *Beasley v. United States, supra,* 491 F.2d at 696 (6th Cir.);

Footnote 4 continued from previous page.

vise him of his rights and to elicit matters of defense or to ascertain that potential defenses are unavailable. Counsel must conduct appropriate investigations, both factual and legal, to determine if matters of defense can be developed, and to allow himself enough time for reflection and preparation for trial." (*Id.*, 389 F.2d at 226)

(6) To prepare adequately for all stages of the proceedings. *Reese v. Georgia, supra; Powell v. Alabama, supra,* 287 U.S. at 71; *United States v. Fisher, supra,* 477 F.2d at 302-04 (4th Cir.); *United States ex rel., Marcelin v. Mancusi, supra,* 462 F.2d at 46-48 (2d Cir., *Kaufman, Chief Judge, dissenting); Moore v. United States, supra,* 432 F.2d at 739 (3d Cir.); *Coles v. Peyton, supra,* 389 F.2d at 226 (4th Cir.).

Moreover, as the First Circuit noted in *Dunker v. Vinzant,* supra, 505 F.2d at 505 fn. counsel's performance need not fall below what is constitutionally required in order to be forbidden in the federal courts. Rather, some higher standard should be required pursuant to the federal court's duty to supervise the attorneys admitted to practice before it.

In conclusion, it is clear that trial counsel was totally unprepared to represent the defendant. It is no answer that counsel took part in the trial, nor can the government claim that counsel's competence is irrelevant because there was an overwhelming case against the defendant. Regardless of the strength of the government's case, a defendant is constitutionally entitled to counsel who was prepared to try the case and deal with the government's proof. As a matter of fact, well prepared counsel is even more necessary in cases where the proof is substantial. The Court should grant a writ of certiorari to determine whether the proper test was applied to determine whether petitioner was afforded his Sixth Amendment rights in this case.

1. The Court should grant a writ of certiorari to determine whether a defendant may properly be tried in absentia when he disappears before the trial has commenced.

Rule 43(b)(1) of the Federal Rules of Criminal Procedure provides that a defendant who has disappeared

may be tried in absentia only when he "voluntarily absents himself *after the trial has commenced . . .* " (emphasis added). Consequently, this Court has approved trials in absentia only in cases where the defendant was present at least through the empanelment of the jury. See eg. *Taylor v. United States,* 414 U.S. 17 (1974); cf. *Drops v. Missouri,* 420 U.S. 162 (1975).

In the present case, appellant disappeared before the trial commenced. Consequently, given the plain meaning of the language used in Rule 43, he could not properly be tried in absentia.

2. The Court should issue a writ of certiorari to determine the circumstances under which the district court is required to hold an evidentiary hearing on a defendant's ineffective assistance of counsel claim.

Petitioner's motion to set aside the verdict was accompanied by affidavits of petitioner and his trial attorney, describing events outside the record which deprived him of his right to effective assistance of counsel. These included trial counsel's failure to consult with petitioner, his failure to provide petitioner with the tapes produced by the electronic surveillance, his failure to interview witnesses which would have refuted portions of the government's proof at trial, and his failure in other ways adequately to prepare for trial.

Petitioner submits that these allegations mandated a factual hearing, both to confirm that the events and omissions had taken place and to determine their effect on petitioner's defense at trial. It is not sufficient for the trial judge or the appellate court merely to examine the trial record and determine that defense counsel appeared to have done an adequate job. Rather, particularly when petitioner submits sworn proof indicating that trial

counsel failed to perform essential services which would not be apparent from the trial record, the petitioner is entitled to a hearing to explore that issue. The trial judge's refusal to hold such a hearing in this case was error.

3. The Court should issue a writ of certiorari to determine whether a defendant who is absent during trial is entitled to a hearing to determine whether his absence is voluntary before the trial may proceed in absentia.

Petitioner was absent during the entire trial in this case. The trial judge elected to proceed in his absence, however, based solely on the fact that petitioner had been present at a pretrial conference two weeks earlier when the trial date was announced.

Trials may proceed in the defendant's absence only when the defendant "voluntarily absents himself after the trial has commenced." Rule 43, Federal Rules of Criminal Procedure. Rarely if ever, could a determination of voluntariness be made without inquiry specifically addressed to the facts surrounding the defendant's disappearance. In the present case, for example, the only fact going to this issue in the trial record was that petitioner was present at a pretrial conference when the trial date was announced. Without further inquiry, that isolated fact was clearly insufficient to establish that petitioner voluntarily waived his Constitutional right to be present at that proceeding.

Consequently, the Court has uniformly required inquiry as a prerequisite to a finding of voluntary absence. Thus, in *Drops v. Missouri,* 420 U.S. 162 (1975), the Court held that the trial court had erred in failing to hold a sufficient inquiry into the voluntariness of defendant's actions which caused him to be unavailable for trial. Likewise, in *Taylor v. United States,* 414 U.S. 17 (1973), the Court referred with approval to the fact that the trial judge conducted an inquiry before concluding that the

trial could continue in the defendant's absence. See also *United States v. Eskew,* 460 F.2d 1028 (9th Cir. 1972).

The right to be present at one's own trial is one of the most fundamental of a defendant's Constitutional rights, in part because a defendant's presence is material to the exercise of such other constitutional rights as the right to confront and cross-examine witnesses and the right to present a defense. Waiver of this fundamental right is not valid unless it is both knowing and voluntary. Since there was no showing of voluntariness in the present case and since the trial judge failed to conduct a hearing on that issue, the trial in absentia violated both appellant's Constitutional rights and his rights under Rule 43. This Court should issue a writ of certiorari to clarify those circumstances under which a hearing is required on this issue.

4. The Court should issue a writ of certiorari to determine whether the trial judge erred in instructing the jury that there was "no question" that petitioner had knowingly absented himself from trial, and in failing to instruct them that non-appearance must be voluntary before it may be considered as evidence of petitioner's consciousness of guilt.

In his charge, the trial judge instructed the jury that they would have to determine whether petitioner's non-appearance at trial constituted consciousness of guilt. He took the factual issue of whether petitioner's non-appearance was "knowing" away from the jury, however, stating:

> There has been evidence that the defendant Robert Wyler was in court prior to this trial and was advised that the trial in this case would commence on Monday, April 24th. There is no question, therefore, that Mr. Wyler had

knowledge that his presence was required on April 24th and throughout this trial.

Moreover, the trial judge never advised the jury that they could consider petitioner's non-appearance as evidence of consciousness of guilt only if they first found that his non-appearance had been voluntary. To the contrary, by repeatedly stating that "non-appearance" alone may constitute evidence of consciousness of guilt, the trial judge created the impression that voluntariness was not an issue.

This instruction was clearly improper and prejudicial. Insofar as it went to the issue of guilt, the question of whether petitioner's non-appearance was "knowing" was a question of fact for the jury, not the court, to decide. *United States v. Wilson,* 435 F.2d 403, 405 (D.C. Cir. 1970) (whether the evidence shows flight is a jury question); *Bailey v. United States,* 410 F.2d 1209 (10th Cir. 1969).

Moreover, non-appearance alone is not evidence of consciousness of guilt. Rather, it is only when such non-appearance is "intentional" that it becomes probative of that issue. *Austin v. United States,* 414 F.2d 1155 (1969); see also *Alberti v. United States,* 162 U.S. 499 (1896).

Finally, the trial judge erred in failing to instruct the jury that even knowing and voluntary flight "may spring from causes very different from that of conscious guilt." *Hickory v. United States,* 160 U.S. 408, 417 (1896), including fear of being wrongfully convicted. cf. *Austin v. United States, supra.* The failure to balance the flight instruction by making reference to these possible innocuous interpretations was clear error. *Allen v. United States,* 164 U.S. 492 (1892); *Austin v. United States, supra.*

CONCLUSION

FOR THESE REASONS A WRIT OF CERTIORARI SHOULD ISSUE TO REVIEW THE JUDGMENT AND OPINIONS OF THE COURT OF APPEALS FOR THE SECOND CIRCUIT.

Respectfully submitted,

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APPENDIX "A"
OPINION DATED NOVEMBER 25, 1980

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-fifth day of November, one thousand nine hundred and eighty.

PRESENT:
HON. IRVING R. KAUFMAN
HON. WILLIAM H. TIMBERS, Circuit Judges
HON. DUDLEY B. BONSAL, District Judge,
sitting by designation

UNITED STATES OF AMERICA,

Appellee,

v.

ROBERT WYLER,

Defendant-Appellant.

N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was submitted.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the Judgment of said District Court be and it hereby is affirmed.

1. Viewed in the light most favorable to the Government, *Glasser v. United States,* 315 U.S. 60 (1942), the evidence is more than sufficient to support Wyler's conviction. *See United States v. Falcone,* 544 F.2d 607 (2d Cir. 1976), *cert. denied,* 430 U.S. 916 (1977). *See also United States v. Bernstein,* 533 F.2d 775 (2d Cir. 1976).

2. The Government fully proved Wyler's participation in the conspiracy charged in the indictment. *See United States v. Cambindo-Valencia,* 609 F.2d 603 (2d Cir. 1979), *cert. denied,* 100 S. Ct. 2163 (1980).

3. Since the conduct of his defense did not "shock the conscience of the Court" or "make the proceedings a farce and mockery of justice," *United States v. Wight,* 176 F.2d 376, 379 (2d Cir.), *cert. denied,* 338 U.S. 950 (1950), Wyler was not unconstitutionally deprived of his right to the effective assistance of counsel. *See Brinkley v. Lefevre,* 621 F.2d 45 (2d Cir. 1980) (per curiam).

4. In light of the cost of retrial, the uncertain likelihood of Wyler's return, and the danger to the Government's witnesses, the district court did not abuse its discretion in trying Wyler *in absentia* after his failure to appear, *see United States v. Tortora,* 464 F.2d 1202 (2d Cir.), *cert. denied,* 409 U.S. 1063 (1972), or in declining to sever Wyler's trial from that of his co-defendants, *see United States v. Rucker,* 586 F.2d 899 (2d Cir. 1978).

5. Viewed in the context of the entire summation and in light of the court's subsequent charge, the prosecutor's comments on Wyler's failure to appear did not deprive Wyler of his right to a fair trial. *See United States v. Bubar,* 567 F.2d 192 (2d Cir.), *cert. denied,* 434 U.S. 872 (1977). Moreover, the weight of the evidence against Wyler renders the error harmless. *See Chapman v. California,* 386 U.S. 18 (1967); *United States v. Nunez-*

Rios, 622 F.2d 1093 (2d Cir. 1980). *See also United States v. Schwartz*, 535 F.2d 160 (2d Cir. 1976).

6. We have examined Wyler's other contentions on appeal, and find them without merit.

s/Irving R. Kaufman
IRVING R. KAUFMAN

s/William H. Timbers
WILLIAM H. TIMBERS

s/Dudley B. Bonsal
DUDLEY B. BONSAL
District Judge

APPENDIX "B"
ORDER DATED FEBRUARY 5th, 1981

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 5th day of February, one thousand nine hundred and eighty-one

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ROBERT WYLER,

Defendant-Appellant.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the defendant-appellant, Robert Wyler,

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge on the panel that heard the appeal and that no such judge has requested that a vote be taken thereon.

s/A. Daniel Fusaro
A. Daniel Fusaro, Clerk

APPENDIX "C"
ORDER DATED MARCH 31, 1981
EXTENDING TIME TO FILE PETITION
FOR WRIT OF CERTIORARI

SUPREME COURT OF THE UNITED STATES
NO. A-829

ROBERT WYLER,

Petitioner,

v.

UNITED STATES

Upon Consideration of the application of counsel for petitioner,

It is Ordered that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including May 6, 1981.

s/Thurgood Marshall
Associate Justice of the
Supreme Court of the United States

Dated this 31st day of March, 1981

Office-Supreme Court, U.S.
FILED
JUL 22 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-2019

In the Supreme Court of the United States

OCTOBER TERM, 1980

ROBERT WYLER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner, who was advised at a pretrial conference that his joint trial with six other defendants would commence five days thereafter, but who nonetheless failed to appear, was properly tried *in absentia*.

2. Whether the trial court instructed the jury incorrectly concerning inferences that could be drawn from petitioner's failure to appear at trial.

3. Whether petitioner was denied effective assistance of counsel at trial.

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In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-2019

ROBERT WYLER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The judgment order of the court of appeals (Pet. App. A) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 25, 1980. A petition for rehearing was denied on February 5, 1981 (Pet. App. B). Mr Justice Marshall extended the time for filing a petition for a writ of certiorari to May 6, 1981, and on June 1, 1981, the petition was filed as of May 6, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a nine-day jury trial in the United States District Court for the Southern District of New York, conducted without his presence, petitioner was convicted on May 4, 1978, of conspiring to distribute cocaine and to possess cocaine with intent to distribute, in violation of 21 U.S.C. 846, and on four substantive counts of distribution and possession with intent to distribute, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(A). Apprehended two years thereafter, he was sentenced to consecutive terms of 10 years' imprisonment on the conspiracy count and the first substantive count, and concurrent terms of 10 years' imprisonment on the remaining substantive counts. The court of appeals affirmed by an unpublished per curiam order (Pet. App. A).

Petitioner was present at a pretrial conference in his case on April 11, 1978, at which all parties were notified by the court that trial would commence on April 24, 1978 (Pet. 3). Petitioner did not appear on the scheduled trial date (Pet. 4). Petitioner's counsel, Michael Stalonas, informed the court that he had last spoken to petitioner on April 21 and did not know where petitioner was or the nature of his reasons for not appearing (Tr. 12, 49).[1] The district court decided to commence the trial—which involved six other defendants—and try petitioner *in absentia*, pursuant to Rule 43(b)(1), Fed. R. Crim. P. (Pet. App. 2a).

The evidence, presented through more than one hundred exhibits and the testimony of two accomplices—Gary Eller and Richard Fusco—and five other witnesses, showed that

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[1] "Tr." refers to the trial transcript; "P. Tr." refers to the transcript of a pretrial conference; "A." refers to the appendix in the court of appeals; "GX" refers to the government's trial exhibits. All record references are based on those in the government's brief in the court of appeals.

between September 1, 1976, and February 1, 1977, petitioner supplied large quantities of cocaine to Eller and Fusco in New York for resale and distribution in Washington, D.C., and Virginia Beach, Virginia. Specifically, petitioner sold eight ounces of cocaine for $8300 in October 1976, another eight ounces for $8700 in November 1976, three ounces for $3600 in December 1976, and one pound for an agreed price of $19,200 later the same month.

ARGUMENT

1. Petitioner contends (Pet. 12-13) that because he was not "initially present" when his trial "commenced," as specified in Fed. R. Crim. P. 43(b)(1),[2] the trial court erred in trying him *in absentia*. Petitioner also argues (Pet. 14-15) that the trial court erred in declining to conduct a hearing on the question whether petitioner's absence was voluntary. The contentions are without merit.

a. It has long been established that a defendant in a noncapital case who is not in custody may waive his right to be present at trial by voluntarily absenting himself. *Diaz* v. *United States*, 223 U.S. 442, 455 (1912); see also *Taylor* v. *United States*, 414 U.S. 17 (1973). Rule 43 merely restates that proposition; and it has consistently been construed to

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[2]Rule 43, Fed. R. Crim. P., provides in pertinent part:

> (a) *Presence Required.* The defendant shall be present at the arraignment, at the time of the plea, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by this rule.
>
> (b) *Continued Presence Not Required.* The further progress of the trial to and including the return of the verdict shall not be prevented and the defendant shall be considered to have waived his right to be present whenever a defendant, initially present,
>
> (1) voluntarily absents himself after the trial has commenced (whether or not he has been informed by the court of his obligation to remain during the trial) * * *.

permit a court to avoid disrupting a scheduled trial by going forward in the absence of a defendant notified of the trial date, whether the disruption is threatened by the defendant's disappearance after an initial appearance at trial or by his failure to appear when the other parties and counsel have assembled for the trial's commencement. *United States* v. *Peterson*, 524 F. 2d 167, 183-184 (4th Cir. 1975), cert. denied, 423 U.S. 1088 (1976); see also *United States* v. *Tortora*, 464 F. 2d 1202, 1210 n.6 (2d Cir.), cert. denied, 409 U.S. 1063 (1972); *Government of the Virgin Islands* v. *Brown*, 507 F. 2d 186, 189 (3d Cir. 1975); *United States* v. *Powell*, 611 F. 2d 41 (4th Cir. 1979).[3] As the Third Circuit explained in *Government of the Virgin Islands* v. *Brown*, *supra*, 507 F. 2d at 189, an absolute rule that a defendant duly notified of his trial date could never be found to have waived his right to be present so long as he took the precaution of failing to make an appearance on the day set for the commencement of the trial "runs counter to common sense and would be a travesty of justice." It "would allow an accused at large upon bail to immobilize the commencement of a criminal trial and frustrate an already overtaxed judicial system until the trial date meets, if ever, with his pleasure and convenience." *Ibid.*

b. Contrary to petitioner's further contention, the district court was not required to conduct a hearing to determine whether petitioner's absence was voluntary. In light of

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[3]In *United States* v. *Benavides*, 596 F. 2d 137, 139 (5th Cir. 1979), the Fifth Circuit accepted the proposition that a waiver of presence may be found where the accused, knowing the trial date, has failed to appear on the first day of trial. It held, however, that in the circumstances of that case the trial court abused its discretion in ordering a trial *in absentia* because there were no severance problems or other factors militating in favor of immediate trial. In *Benavides* there were only two defendants, and both had absconded. By contrast, the trial here involved six defendants in addition to petitioner, and a severance was the only alternative to a trial *in absentia*.

his counsel's disavowal of any knowledge of petitioner's whereabouts or his reason for not appearing, and in the absence of any circumstances suggesting that petitioner might have been prevented by other persons from appearing in court, a hearing would have been futile. The court could presume that petitioner, having been advised 13 days earlier of the date that trial would commence, had voluntarily absented himself—subject, or course, to reconsideration of that finding should petitioner appear later with an explanation.[4]

Contrary to petitioner's suggestion (Pet. 14), *Drope* v. *Missouri*, 420 U.S. 162 (1975), does not support his contention that he was entitled to a hearing on whether his absence was voluntary. In *Drope*, the question of the voluntariness of the defendant's absence from his trial—which resulted from his hospitalization following a suicide attempt—was intertwined with the question of his competence to stand trial. The Court held only that the trial court had made insufficient inquiry into the latter question.[5]

2. There is similarly no merit to petitioner's contention (Pet. 15-16) that the trial judge committed reversible error by failing to instruct the jury that it was to consider whether

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[4]When petitioner was apprehended two years after his conviction, he explained that he had absented himself from trial because his attorney was unprepared. This explanation does not negate the voluntariness of his absence. It merely indicates that when petitioner, according to his own account, lost confidence in his retained counsel on or before April 11, 1978 (Pet. 2-3), he chose to continue with representation by that attorney and then abscond before trial, rather than discharge his attorney, seek new counsel, and move in advance of trial for a continuance to allow new counsel to become familiar with his case.

[5]*Taylor* v. *United States*, *supra*, and *United States* v. *Eskew*, 460 F. 2d 1028 (9th Cir. 1972), on which petitioner also relies (Pet. 14-15), merely noted that hearings had been held on the voluntariness question. They do not suggest that hearings must be held when there is nothing to hear.

petitioner's absence was voluntary and that it could find that even a voluntary absence was the result of motives other than consciousness of guilt.

Just as there was no basis for a hearing by the trial judge on the voluntariness of petitioner's totally unexplained failure to appear, there was no basis for a jury finding on that question. And, as noted, petitioner's explanation, after his apprehension two years later, showed that he had in fact made a deliberate decision not to appear for his trial.

The court's instruction as to permissible inferences from a voluntary nonappearance did not, as petitioner suggests, prejudice him by requiring the jury to find that his nonappearance was evidence of guilt. The court simply instructed the jury (A. 615) that (as the parties had stipulated) petitioner had been advised of the trial date and that there was therefore "no question" that he knew that his appearance was required on that date and throughout the trial. The court then stated (A. 616; emphasis added) that a knowing nonappearance "*may* tend to prove consciousness of guilt" and thus "*may* be considered and weighed" by the jury "in connection with all the other evidence." It emphasized (A. 615-616) that it was for the jury to decide whether petitioner's nonappearance showed a consciousness of guilt and "the significance, if any" to be attached to it. This instruction was, we submit, unexceptionable.

Finally, while an objection was made on petitioner's behalf to the giving of any flight instruction at all, no objection was made to the content of the instruction. In the absence of objection, any error in the instruction was harmless. *Austin* v. *United States*, 414 F. 2d 1155, 1158 (D.C. Cir. 1969).

3. Petitioner's claim of ineffective assistance of counsel, which he first raised by a motion to set aside the verdict after

he was apprehended, is based on the allegation—supported by his own affidavit and that of Michael Stalonas, his trial attorney—that Stalonas had never consulted with him about trial strategy or potential defenses, had never investigated the case or interviewed potential defense witnesses, and, as a result, was unprepared for trial (Pet. 2-5). According to both affidavits, Stalonas's lack of preparation resulted primarily from his commitments on other criminal matters. The trial court stated, however, that regardless of whether Stalonas had conferred with petitioner, he functioned "quite effectively" as lead counsel throughout the trial (A. 738), and on that basis it denied the motion without a hearing.

The court of appeals, in affirming, stated (Pet. App. 2a; citation omitted) that the conduct of petitioner's defense "did not 'shock the conscience of the Court' or 'make the proceedings a farce and mockery of justice.' " Petitioner correctly states (Pet. 6) that this standard differs from the standard adopted by most other circuits for evaluation of the effectiveness of assistance of counsel. We submit, however, that this affords no ground for review in petitioner's case. The most recent of the two authorities cited by the court in affirming petitioner's convictions, *Brinkley* v. *Lefevre*, 621 F. 2d 45 (2d Cir. 1980), cert. denied, No. 79-6889 (Oct. 6, 1980) (per curiam), is one of a number of recent Second Circuit cases[6] indicating that court's willingness to reconsider its "farce and mockery" standard for testing such Sixth Amendment claims if presented with a case in which the result would be different "under the standards adopted by other Circuits (e.g., reasonably effective

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[6] *United States* v. *Aulet*, 618 F. 2d 182, 187 (2d Cir. 1980); *Twitty* v. *Smith*, 614 F. 2d 325, 333 (2d Cir. 1979); *Bellavia* v. *Fogg*, 613 F. 2d 369, 374 (2d Cir. 1979); *Indiviglio* v. *United States*, 612 F. 2d 624, 629 n.8 (2d Cir. 1979), cert. denied, 445 U.S. 933 (1980); *United States* v. *Menendez*, 612 F. 2d 51, 55 (2d Cir. 1979).

assistance)." 621 F. 2d at 47. The record in this case both sustains the trial court's finding concerning the competence of petitioner's trial attorney and makes it clear that, contrary to petitioner's contention (Pet. 6-7), this case is an inappropriate vehicle for reviewing the standards applied by the different circuits to Sixth Amendment ineffective assistance claims and for prescribing a single formulation. The same result would be reached under the more liberal test for which petitioner contends.

Thus, the transcript of a pretrial conference held April 19, 1978, indicates that Stalonas had already listened to tapes of conversations between petitioner and Fusco (P. Tr. 21). On April 21, Stalonas was provided, together with the other defense counsel, with Fusco's and Eller's Jencks Act statements and copies of all government exhibits, including the tape of a key conversation on December 13, 1977, between petitioner and Fusco; Stalonas listened to the latter tape on highly sensitive equipment supplied by the United States Attorney's office (see Tr. 17). He successfully moved to redact the transcript of the tape by deleting references to weapons, dynamite, and acts of violence (Tr. 22, 24). Although his motion to exclude the tape in its entirety on grounds of inaudibility was denied (Tr. 63), he stressed in his opening statement and in his summation to the jury that the tape was too inaudible to be given any credence (Tr. 93, 1519).

During trial, Stalonas cross-examined both Eller and Fusco effectively and at length. For example, he developed Eller's extensive prior criminal activity (Tr. 225, 301), and on that basis argued in summation that Eller, faced with state drug charges carrying a mandatory life sentence, was motivated to frame petitioner and was lying under oath (Tr. 1496-1497, 1510, 1511). He brought out evidence that Eller had a big cocaine source in Florida (Tr. 301, 431, 432), and argued to the jury that it was the Florida dealer and not

petitioner who was Eller's source (Tr. 1496-1497, 1510-1511). He also brought out that, despite Eller's testimony that petitioner had been a reliable and ready cocaine source, Eller was unable, after he became a DEA informant, to buy any cocaine from petitioner (Tr. 305). This fact was also argued to the jury (Tr. 1513).

Similarly, Stalonas developed Fusco's prior criminal record and showed that Fusco was also facing serious felony charges that gave him a motive to frame petitioner rather than testify truthfully (Tr. 869-880). Stalonas also brought out that Fusco was a heavy cocaine user during the period covered by the indictment, and on that basis argued to the jury that Fusco's powers of recollection had been distorted. His questioning also produced testimony that Fusco had purchased an after-hours club from petitioner and still owed a large sum of money on the deal (Tr. 865, 892). The December 13 tape reflected a $10,000 payment from Fusco to petitioner, and petitioner had acknowledged that this satisfied a debt that Fusco owed by reason of his loss, through police seizure, of cocaine which petitioner had advanced to him (Tr. 836; GX 53, 53A). On the basis of the cross-examination, Stalonas argued to the jury that the $10,000 was actually payment for purchase of the club (Tr. 1519).[7]

Finally, Stalonas took the lead among defense counsel in objecting to the government's examination of Eller and Fusco (Tr. 137, 153, 155, 157, 159, 165, 167, 181, 202-203, 213-214, 218, 219, 221, 589, 590, 591, 593-594, 599, 601, 605, 607, 610-613, 669, 778, 783, 790-792, 794, 796, 798, 799, 803,

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[7]In the affidavit in support of his motion to set aside the verdict, as well as in his certiorari petition (Pet. 3), petitioner alleges that the $10,000 was payment for the return of an automobile. It does not appear that that explanation would have been any more readily accepted by the jury than the argument that it was payment for the club.

805, 815, 820, 823-826, 840, 841), frequently anticipating in his objections the line of questioning the government was about to pursue (see, *e.g.*, Tr. 169-171).

In view of the fact that the competence of petitioner's defense counsel is established by his actual performance at trial—a matter ascertainable from the record—there is no merit to petitioner's contention (Pet. 13-14) that he was entitled to a hearing on his ineffective assistance claim. Allegations concerning lack of preparation are irrelevant where it appears that counsel conducted the defense in a reasonably competent manner, and where there are no specific claims concerning particular testimony or other evidence that could have made a difference in the case and that counsel failed to present. Petitioner's assertion in his affidavit and in this Court (Pet. 3) that he "knew several persons who could have disputed parts of the Government's proof" was too vague and conclusory to require a hearing in these circumstances.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

LAWRENCE G. WALLACE
Acting Solicitor General

D. LOWELL JENSEN
Assistant Attorney General

MARSHALL TAMOR GOLDING
Attorney

JULY 1981

DOJ-1981-07